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CASE NO. 90-369

In The

Supreme Court of the United States

October Term, 1990

HARLEY VOLLRATH,

Petitioner,

v.

GEORGIA PACIFIC CORPORATION,

Respondent.

BRIEF IN OPPOSITION
TO A PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

– AND APPENDIX –

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COUNTER-STATEMENT OF QUESTIONS PRESENTED FOR REVIEW

I.

WHETHER, UNDER THE *ERIE* DOCTRINE, A FEDERAL COURT SITTING IN DIVERSITY MAY DISREGARD AN INAPPOSITE INTERMEDIATE APPELLATE COURT DECISION INCONSISTENT WITH OTHER APPELLATE COURT DECISIONS AND WITH PRONOUNCEMENTS OF THE STATE'S HIGHEST COURT IN DETERMINING TO GRANT SUMMARY JUDGMENT IN FAVOR OF AN EMPLOYER ON A STATE-LAW CLAIM OF WRONGFUL TERMINATION?

II.

WHETHER PLAINTIFF-PETITIONER ABANDONED AND/OR FAILED TO DEMONSTRATE A GENUINE ISSUE OF MATERIAL FACT OF WHETHER POSITION ELIMINATION CONSTITUTES REASONABLE CAUSE AS A MATTER OF LAW?

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BRIEF IN OPPOSITION
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COUNTER-STATEMENT OF THE CASE

A. On May 5, 1987, Plaintiff-Petitioner Harley Vollrath ("Vollrath") filed a one-count Complaint, alleging that Georgia-Pacific Corporation ("Georgia-Pacific" or the "Company") had wrongfully discharged him. Georgia-Pacific timely removed this case to the United States District Court for the Eastern District of Michigan on the basis of diversity of citizenship. [R. 1].

Georgia-Pacific sought summary judgment before the District Court on several alternate and independent grounds.[1] The Company argued, *inter alia*, not only

[1] Georgia-Pacific permitted Vollrath to depose the five persons whose affidavits were submitted in support of its dispositive motion. Those affiants reaffirmed the material contents of their affidavits in their depositions. Deposition of Douglas E. Wagner ("Wagner dep."), taken on July 25, 1988, pp. 5 and 12; Deposition of

(*concluded on page 2*)

that Vollrath's employment was at-will as a matter of law, but also that there was no genuine issue of material fact that the oral statements and written memorandum upon which Vollrath relied were insufficient to demonstrate a legitimate expectation that his employment relationship with Georgia-Pacific could be terminated only for good cause, in light of the express at-will policies in Georgia-Pacific's Operating Procedures Manuals ("OPM's") and Vollrath's deposition admissions that the Company could unilaterally change its employment policy statements, that no one could make a binding agreement with him contrary to Company policy statements, and that the employer's policy statements in the OPM's in effect at the time of his separation applied to him.

In the alternative, the Company also argued that there was no genuine issue of fact that Vollrath's position was eliminated, and that his termination due to position elimination constituted cause as a matter of law.

B. The District Court granted Georgia-Pacific's Motion on December 5, 1988, and dismissed Vollrath's Complaint [R. 50].

In its Memorandum Opinion granting Georgia-Pacific summary judgment, the District Court concluded, as a matter of law, that Vollrath was an at-will employee who could be terminated with or without cause, at any time [R. 49, p. 6]. Relying on Michigan decisional law and Sixth Circuit authority upholding at-will policy statements that are unilaterally imposed and that modify prior policy statements, the District Court

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(continued from page 1)

Robert Fuller ("Fuller dep."), taken on July 19, 1988, p. 12; Deposition of Diane Kievit ("Kievit dep."), taken on July 19, 1988, p. 7; Deposition of Leroy Allen Campbell ("Campbell dep."), taken on July 29, 1988, p. 12; Deposition of Roland Taylor ("Taylor dep."), taken on July 29 1988, p. 42. [The cited excerpts of these deposition transcripts were submitted before the District Court as Exs. 20-24 in support of the Company's dispositive motion, R. 41].

reasoned that neither the alleged oral statements nor a written memorandum by the plant manager at the Kalamazoo facility where Vollrath was employed were sufficient to create a legitimate expectation of continued employment absent cause for discharge, given the express at-will policy statements in the OPM's, and given Vollrath's deposition admissions [R. 49, pp. 5-7]. At most, the District Court reasoned, the comments and memorandum rose to the level of nothing more than a unilateral, subjective expectancy which was not "legitimate" or reasonable under Michigan law in light of the express at-will employer policy statements [R. 49, p. 7].

Finding that no for-cause employment contract existed between Georgia-Pacific and Vollrath, the District Court did not reach the question of whether the elimination of Vollrath's position constituted "reasonable cause" as a matter of law under Michigan law.

C. Although he asks this Court to grant certiorari in part on the ground that there is a genuine issue of material fact as to whether the Company had "reasonable cause" to terminate him, Vollrath abandoned that issue by failing to brief the issue before the Sixth Circuit and/or to cite to *any* record evidence to dispute the economic motivation for the reduction-in-force in which his position was eliminated. Georgia-Pacific submitted record citations demonstrating that Vollrath's position was eliminated in an economically motivated reduction in force so that, under Michigan decisional law, Georgia-Pacific had "reasonable cause" to terminate him as a matter of law. *See* Appendix A.

In his initial brief on appeal, Vollrath first argued that *subsequent* oral modifications could modify express written at-will policy statements under Michigan law. However, when the Michigan Supreme Court thereafter issued decisions in two companion cases, one of which involved the very counsel representing the Petitioner here, Vollrath abruptly shifted his analysis, in a patent

but failed attempt to fall within the pronouncements in *Bullock* v. *Auto Club of Michigan*, 432 Mich. 472, 444 N.W.2d 114 (1989). For the first time in his reply brief on appeal to the Sixth Circuit, Vollrath raised the issue of whether oral statements, now supposedly *prior* to the express at-will policy statements, could give rise to a legitimate expectation of for-cause employment. In its opinion affirming summary judgment in favor of Georgia-Pacific, the Sixth Circuit noted that shift. *See* pp. B-6–B-7 of Appendix B in support of Vollrath's petition for a writ of certiorari.

During a vigorous oral argument before the Sixth Circuit, the panel questioned the parties about the impact on this matter of the *Bullock* case and its companion case, *In re Certified Question: (Bankey* v. *Storer Broadcasting Co.)*, 432 Mich. 438, 443 N.W.2d 112 (1989) (*"Bankey"*). At the conclusion of Vollrath's rebuttal, perhaps because Vollrath had so radically shifted his analysis, the Honorable James L. Ryan (formerly a Justice of the Michigan Supreme Court when that Court issued its decision in *Toussaint* v. *Blue Cross and Blue Shield of Michigan*, 408 Mich. 579, 292 N.W.2d 880 (1980)) termed Vollrath's case "a lawsuit in search of a theory."

Unpersuaded by Vollrath's efforts, the Sixth Circuit affirmed the District Court's grant of summary judgment in favor of Georgia-Pacific on the grounds that the alleged oral statements and the written memorandum authored by the Kalamazoo facility plant manager when the Company's express at-will policy statement permitted only the Chief Executive Officer of the corporation to modify the at-will policy were insufficient to establish a legitimate expectation of for-cause employment under Michigan law.

D. Vollrath's petition for rehearing *en banc* was denied by order dated May 31, 1990. He now seeks this Court's discretionary review of a state-law case on the

sole theory that the Sixth Circuit has failed to correctly apply substantive Michigan decisional law in dismissing his state-law breach of employment contract case, purportedly in violation of the *Erie* doctrine. *Erie R. Co. v. Tompkins*, 304 U.S. 64, 58 S.Ct. 817, 82 L. Ed. 1188, 114 A.L.R. 1487 (1938).

COUNTER-STATEMENT OF FACTS

A. Petitioner's Positions At The Kalamazoo Mill

Georgia-Pacific operates a small paper mill in Kalamazoo, Michigan. In 1981, plaintiff became an Area Maintenance Supervisor at that facility.

Effective January 1, 1983, he was promoted to Plant Maintenance Superintendent, a high-level management position at the mill.

In early January 1986, he was offered and accepted the position of Field Maintenance Representative, a job which required him to travel to other Georgia-Pacific mills and to help with any maintenance problems that he identified [Vollrath dep. 102].

As a Field Maintenance Supervisor, Vollrath was to handle maintenance problems at certain facilities, with major emphasis on the Taylorsville, Indiana mill. Living in Kalamazoo, where he was still based, Vollrath was to assist elsewhere on an as needed basis. Though he remained on the Kalamazoo payroll, his work, salary and expenses at other mills were to be charged to those facilities, but only when he worked there [*See* R. 41, Diane Kievit Aff., Ex. 7, at ¶¶ 1, 8; Norman dep. 72-75].

After a relatively short time, Vollrath developed a poor attitude towards his new position. Vollrath admitted that after he went to Taylorsville he developed the belief that that mill would close fairly soon if things were not fixed [*Id.* at 104, 106]. He voiced a negative view towards the Taylorsville plant and its employees, and indicated that

he no longer wanted to go there [Norman dep. 43-44; Taylor Aff., R. 41, Ex. 1, at ¶ 4].

B. The Kalamazoo Mill's Conceded Economic Difficulties

As Vollrath admitted, 1985 was a bad year for the Kalamazoo mill [Vollrath dep. 186]. By November 1985, the mill was "really hurting" because of a problem with a major piece of equipment for which he had maintenance responsibility [*id.* at 186, 187].

In fact, two other non-union employees were let go in May and December of 1986 for similar reasons as Vollrath was eventually separated; *i.e.*, position elimination. The alternative would have been to keep Vollrath on the Kalamazoo payroll, doing very little at a high salary, at a time Norman was under orders to reduce Kalamazoo's workforce and expenses where possible [Norman dep. 73].

Given these circumstances, and the fact that no openings existed in Kalamazoo, economic considerations required that Vollrath's position be eliminated from the Kalamazoo facility payroll a few months later, which by then had fallen on even harder economic times [Norman dep. 74, 75].

In short, Vollrath's employment was terminated as part of a gradual reduction of the salaried and hourly work force at the Kalamazoo facility, resulting from a shutdown of certain parts of that mill and a general corporate directive to reduce the workforce and costs at that facility where possible [Kievit dep 15-16].

That gradual reduction resulted in a 12% decline (from approximately 400 to 350 persons) in Georgia-Pacific's workforce from the years 1984-1987 [Taylor dep. 39-40].

C. The Company's Express At-Will Policy Statements

It is uncontested that Georgia-Pacific prepares and maintains an Operating Policy Manual ("OPM") which is periodically revised. A copy of the OPM is distributed to certain key salaried supervisory employees, such as Vollrath.

Revisions of the OPM are distributed on either an *ad hoc* basis with respect to a specific subject or incorporated generally in subsequent revised OPM's on a periodic basis.

Although the Company's OPM existed prior to Vollrath's assuming his new management position in 1983, he claimed that he had not read its contents [Vollrath dep. 8-9].

1. THE COMPANY'S 1983 OPERATING POLICY MANUAL

In early January 1983, when Vollrath undertook the position of Plant Maintenance Superintendent at the Kalamazoo mill, the Georgia-Pacific 1983 OPM contained an introductory preface signed by the Chief Executive Officer of the Company, which stated that the OPM would be periodically revised every two years or more, if necessary.

The 1983 OPM also contained a section entitled "Termination of Employment – Salaried Employees." The first paragraph of that Section set forth an express at-will policy statement:

> It is the policy of Georgia-Pacific that the employment and compensation of any employee can be terminated, with or without cause, at any time, at the option of the employee or at the option of the company. No employee or representative of Georgia-Pacific, other than the Chief Executive Office or the Corporate Director – Employee Relations and Administrative Services,

> has any authority to enter into any agreement extending the employment of any employee for any specified period of time, or to make any agreement contrary to the foregoing.
>
> [Ex. 8, p. 49, R. 41.]

At the end of this Section on Termination of Employment, a paragraph entitled "Policy Exceptions" stated that "there will be no exceptions to this policy without the prior written approval of the Chief Executive Officer of the Company." [*Id.*]

2. THE COMPANY'S 1985 OPERATING POLICY MANUAL

In May 1985, Georgia-Pacific again issued a revised OPM. Vollrath admitted that the 1985 OPM was the most recent version of Georgia-Pacific's Operating Policy Manual, and that he believed that there would be subsequent OPM's [*id.* at 315].

Although Vollrath first testified in deposition that he did not recall reading the at-will language of the 1985 OPM, he later admitted that he had read it, after his wife had found his copy of the manual [Vollrath dep. 300-302].

As in the 1983 OPM, the at-will part of the Termination Section of the 1985 OPM was found in the introductory paragraph to this Section and stated:

> It is the policy of Georgia-Pacific that the employment and compensation of any employee can be terminated, with or without cause, at any time, at the option of the employee or at the option of the Company. Specific procedures to be followed depend upon the circumstances of the termination. Any questions about this policy should be referred to the office of the Vice President – Human Resources.
>
> [R. 41, Ex. 9.]

A subsequent paragraph entitled "Other Involuntary Discharges", in the subsection on "Involuntary Termination," stated:

> There may be grounds for discharge other than those discussed above. This *discussion is not meant to be inclusive or to limit in any way management's freedom to discharge an employee at any time for any reason not prohibited by law.*

[Emphasis supplied.]

3. PETITIONER'S ADMISSIONS RELATING TO THE OPM's

Vollrath admitted in deposition that, if he had read the at-will policy in the 1983 OPM, he would have known that any writing or verbal statements inconsistent with this policy were, as he put it, "no good" [Vollrath dep. 136-137].

Vollrath also conceded that the at-will policy in the 1985 OPM, which is virtually identical to the 1983 OPM's at-will provision, stated that his employment could be terminated with or without cause at any time by the Company [*id.* at 330]. He also admitted that he understood that provision to mean that Georgia-Pacific could terminate his employment at any time for any reason [*id.*].

He further believed that the Company's employment policies had changed in the past and would change in the future, and that the language in the 1985 OPM indicated to him that the Company had the right to change any section of the OPM it wanted [*id.* at 315-316]. He also admitted that he could not rely on any employment policy remaining in effect forever and that, when an OPM was periodically revised, a policy statement could be eliminated, modified or remain the same [*id.* at 316].

Finally, Vollrath testified that the employment policy in effect at the time would control until changed, and

he had previously testified he believed he was subject to whatever rules were in effect at the time [*id.* at 242, 316].

Vollrath added that it was his usual practice to familiarize himself with documents he received [*id.* at 314]. He also agreed that a salaried employee at his level should know and follow the Company's employment rules [*id.* at 61-62]. He admitted reading the Termination Section of the 1985 OPM [Ex. 9, R. 41] during his tenure as a Company employee [Vollrath dep. 310-311]. He also admitted reading the OPM's Termination Section to his foremen, pursuant to Plant Manager Norman's orders, because Norman wanted "everybody to go over it" [*id.* at 318]. He stated that he gave his foremen the 1985 OPM, turned to page 20, and told them to read the Termination Section [*id.* at 318-319]. Significantly, prior to having his foremen read this Section, Vollrath had read the entire section, including the at-will paragraph [*id.* at 319, 320, 329].

Vollrath testified that he believed that Georgia-Pacific was bound by whatever was in this Termination Section [*id.* at 332-333]. He also admitted that he did not believe that any person from the Company was allowed to or could deviate from these policy statements in any way, and stated his answer applied to all the policy statements in the Termination Section, including, by necessity, the Company's "at-will" policy [*id.* at 332-334].

Finally, in an important concession, Vollrath also admitted that he believed that no one [including Norman] could do any-thing contrary or inconsistent with the written policies of the 1985 OPM Termination Section, including its at-will policy [*id.* 334].

D. Discussions Relating To The At-Will Policy Statements

In 1983 and 1984, the Kalamazoo mill was involved in two wrongful discharge suits filed by former salaried em-

ployees. The suits claimed that Company had fired the plaintiffs in breach of a for-cause employment contract.

In assisting another counsel in preparing the Company's Answer to a Complaint alleging wrongful discharge brought by another former employee, Vollrath affirmatively acknowledged that employment with Georgia-Pacific was at-will [Wagner dep. 9-10, 13]. In fact, it was Vollrath's assistance that corrected misinformation received by that counsel from in-house counsel to the effect that the Company's employees were other than at-will [Wagner dep. 13]. Vollrath also acquiesced in the assessment that the Company was an at-will employer at the preparation session for his deposition [Wagner dep. 6-7]. At one such preparation session, counsel read the Company's at-will disclaimer to the supervisors present [Fuller dep. 12].

In 1984, Diane Kievit, then the Kalamazoo facility's Assistant Personnel Manager, held three or four meetings with the Kalamazoo salaried employee work force, at the request of Plant Manager Norman, to review the Company's at-will policy. These meetings were prompted by the 1983 wrongful discharge suits. *See* Diane Kievit Aff., Ex. 7, at ¶¶ 1-6, R. 41.

Kievit stated that every salaried employee, including Vollrath, attended at least one of these meetings [Kievit Aff. at ¶ 4, R. 41, Ex. 7]. In preparation for the meeting, she ordered extra copies of the 1983 OPM [*id.* at ¶ 3]. A copy of that OPM, with Vollrath's name handwritten on it, was found in his office. Vollrath conceded that he might have had a 1983 OPM and just thrown it in one of his drawers [Vollrath dep. 303-304].

At these meetings Kievit handed out a copy of the 1983 OPM to everyone who attended and told them to turn to page 49, the page where the at-will policy statement was set forth [Kievit Aff., Ex. 7, at ¶ 6, R. 41]. Kievit instructed the supervisors to read the at-will

disclaimer themselves, and to review the disclaimer with their subordinates [Campbell dep. 31-32].

Vollrath was present at a meeting sometime in 1984, as was his co-worker Robert Fuller, when the Company's at-will disclaimer in the 1983 OPM was distributed to and read by all employees present and was explained [Fuller dep. 13-15]. Mr. Fuller testified that he had personally observed Vollrath at that meeting [Fuller dep. 16].

At those meetings, the supervisors were instructed, not only to read the at-will disclaimer themselves, but also to review the disclaimer with their subordinates [Campbell dep. 31-32].

Subsequent to those meetings, Plant Manager Norman met with certain top-level managers, including Petitioner. He gave them a copy of the 1983 OPM and told them to review its at-will policy with their supervisory subordinates [Kievit Aff. at ¶ 7, R. 41, Ex. 7; Campbell Aff. at ¶ 3, R. 41, Ex. 2; and Norman dep. 57-59, 81, 90, 92].

Vollrath admitted that he held meetings with his subordinate supervisors to discuss Georgia-Pacific's at-will policy statements because Norman ordered it [Vollrath dep. 30], and he believed these meetings were prompted by the earlier wrongful discharge suits [*id.*]; however, he believed that he used the *1985* OPM in these meetings, a distinction without a difference.

Vollrath met in his office with his supervisors and went over the Termination of Salaried Employees section of the OPM then in effect [*id.* at 29]. Vollrath admitted that Norman told him that all employees must read the Section on Employment Termination, and that he told his employees that Norman wanted him to have them read and understand Georgia-Pacific's policy regarding discharge and the subject of job security [*id.* at 31]. He also admitted reading the at-will provision in the 1985 OPM [*id.* at 320].

E. Vollrath's Admissions About The Bases For His Contract Claim

The alleged oral statements upon which Vollrath relied were casual statements among friends, over beers, after work. Vollrath conceded in deposition that, if he had read Georgia-Pacific's at-will policy statements, he would have known that the oral statements had no effect [Vollrath dep. 136-137]. Norman also testified that, although he may have said "the best way to keep your job was to do it," he never said nor meant that if an employee did his job it was guaranteed that the Company would not discharge the employee [Norman dep. 54-55].

Vollrath also points to an undated and unauthorized memorandum from his longtime friend Norman as a basis for his breach of employment contract claim. The memorandum stated:

> As mutually agreed upon, in the event that problems arise in Harley's performance as Maintenance Superintendent, he will be given the option to return to Area Supervisor.

In deposition, however, Vollrath admitted that the memorandum was silent as to any termination criteria or duration of employment with the Company [Vollrath dep. 119]. He also admitted that, if he had read the Georgia-Pacific at-will policy statement, he would have known that the memorandum was "no good" [Vollrath dep. 136-137]. The memorandum was written in or around March of 1984, when the 1983 OPM was in effect, which expressly stated that the Company's at-will policy could not be modified except in writing by the Chief Executive Officer of the Company [Vollrath dep. 111]. Both Vollrath and Norman knew that the latter did not have the authority to write the memorandum, which Vollrath conceded was written out of personal friendship and in case anything happened to

Norman, not to Vollrath [Vollrath dep. 112-113, 117; Norman dep. 96].

ARGUMENT

I.

THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT DID NOT VIOLATE THE *ERIE* DOCTRINE IN THE CASE AT BAR.

In support of the sole basis for his petition for a writ of certiorari, Vollrath relies primarily upon a single decision by one panel of Michigan's intermediate appellate court, *Dalton* v. *Herbruck Egg Sales Corp.*, 164 Mich. App. 543, 417 N.W.2d 496 (1987), in support of his claim that the Sixth Circuit violated the *Erie* doctrine by disregarding Michigan decisional law relating to employment contracts. Vollrath contends, incorrectly, that the Sixth Circuit "could not point to any other decision of the Michigan Court of Appeals or the Michigan Supreme Court that indicated that *Dalton* was wrongly decided" [Petition, pp. 9-10].

While it is well-settled that, under the *Erie* doctrine, a federal court sitting in diversity applies state substantive law to the dispute at bar, it is equally well-settled that a federal court may disregard an intermediate appellate court's decision where it is convinced by other persuasive data that the state's highest court would decide otherwise, where the decision is in conflict with other decisions by courts of the same level, and/or where a decision of the state's highest court has been rendered in an analogous or related area and has laid down broad principles or theories with which the lower court's decision is inconsistent. *Fidelity Union Trust Co.* v. *Field*, 311 U.S. 169, 61 S. Ct. 176, 85 L. Ed. 109 (1940); *Commissioner* v. *Bosch's Estate*, 387 U.S. 456, 87 S. Ct. 1776, 18 L. Ed. 2d 886 (1967). This Court has observed that, even though the highest state court

is the final authority on state law, it is still the duty of the federal courts, where state law supplies the rule of decision, to ascertain and to apply that law; thus, the federal courts need not blindly follow the decision of an intermediate state court where it is convinced by other persuasive data that the state's highest court would decide otherwise. *Fidelity Union Trust Co.*

Vollrath misstates the Sixth Circuit's position in *Pratt* v. *Brown Machine Co.*, 855 F.2d 1225 (6th Cir. 1988), which the *Vollrath* panel cited with approval, by asserting that the *Pratt* decision merely referenced another Sixth Circuit case, *i.e.*, *Reid* v. *Sears, Roebuck & Co.*, 790 F.2d 453 (6th Cir. 1986), rather than any Michigan decisional law, to justify its disregard for the *Dalton*[2] case. The *Pratt* panel expressly adopted the analysis in *Reid*, which explained that express at-will policy statements, such as the statements there and at bar, had been enforced by the intermediate appellate courts in Michigan as to both prospective and existing employees in *Eliel* v.

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[2] The dubious reasoning of *Dalton* was not followed by the Sixth Circuit in *Pratt*:

> The dissent takes us to task for refusing to follow the decision of the Michigan Court of Appeals in *Dalton* v. *Herbruck Egg Sales Corp.*, 164 Mich. App. 543, 417 N.W.2d 496 (1987). While it is true that "[t]he law of Michigan is controlled by a decision of the Michigan Court of Appeals until the Michigan Supreme Court or another panel of the Michigan Court of Appeals rules otherwise," *Wieczorek* v. *Volkswagenwerk, A.G.*, 731 F.2d 309, 310 (6th Cir. 1984) (citations omitted), it is equally true that we need not blindly follow such precedent where we are "convinced by other persuasive data that the highest court of the state would decide otherwise.", *Kochins* v. *Linden-Alimak Inc.*, 799 F.2d 1128, 1140 (6th Cir. 1986) (quoting *Clutter* v. *Johns-Manville Sales Corp.*, 646 F.2d 1151, 1153 (6th Cir. 1981). We believe *Dalton* is inconsistent with the teachings of *Toussaint* and its progeny, and thus subscribe to the better reasoned analysis of Judge Lively in *Reid* v. *Sears, Roebuck & Co.*, 790 F.2d 453 (6th Cir. 1986).

See also Nora v. *Carrier*, 861 F.2d 457, 461 (6th Cir. 1988).

Sears, Roebuck & Co., 150 Mich. App. 137, 387 N.W.2d 842 (1986), and *Ledl* v. *Quik Pik Food Stores, Inc.*, 133 Mich. App. 583, 349 N.W.2d 529 (1984), discussed, *infra*.

The sole intermediate appellate case upon which Vollrath relies for the proposition that the Sixth Circuit violated the *Erie* doctrine in affirming summary judgment is also inapposite, as the Sixth Circuit properly pointed out in its opinion below. The holding in *Dalton* relates only to policy manuals containing purportedly contradictory policy statements and does not involve extrinsic oral statements. Nor are the express at-will policy statements in *Dalton* and in this case comparable: the express at-will policy statement at issue here prohibits modification by anyone other than the Chief Executive Officer of the Company.

Dalton relies on the non-evident premise that the mere existence of a progressive disciplinary system creates a for-cause termination procedure. This leap of faith gives non-union employees more protection that union employees because it fails to distinguish between procedural rights and substantive policies. If *Dalton* were the law, no union contract would bother to spell out that discharge can only be "for cause" where a contract also has a progressive disciplinary procedure.

Particularly where the intermediate appellate case cited by Vollrath is inapposite and illogical, and where it is in conflict with other decisions of the same court and with the state's highest court, the Sixth Circuit could well be persuaded that it should not be followed, pursuant to *Erie* and its progeny.

II.

THE SIXTH CIRCUIT PROPERLY AFFIRMED SUMMARY JUDGMENT ON THE BASIS THAT VOLLRATH WAS AN AT-WILL EMPLOYEE.

Under this Court's recent decisions, the moving party has a right to summary judgment where it has demon-

strated that a plaintiff's claims have no factual basis. *Celotex Corporation* v. *Catrett*, 477 U.S. 317, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986); *Anderson* v. *Liberty Lobby, Inc.*, 477 U.S. 242, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986); *Matsushita Electric Industrial Co., Ltd.* v. *Zenith Radio Corp.*, 475 U.S. 574, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986).

Under this precedent, and relying upon Michigan decisional law, the Sixth Circuit properly affirmed the District Court's grant of summary judgment in favor of the Company on the basis that, given Vollrath's deposition admissions and Georgia-Pacific's express at-will policy statements, Vollrath was an at-will employee.

1. In *Toussaint* v. *Blue Cross and Blue Shield of Michigan*, the Michigan Supreme Court reaffirmed the general rule that "in the absence of distinguishing features or provisions or a consideration in addition to the services to be rendered, . . . contracts [for permanent employment] are indefinite hirings, terminable at the will of either party." 408 Mich. at 596, quoting *Lynas* v. *Maxwell Farms*, 279 Mich. 684, 687, 273 N.W.2d 315 (1937). Accordingly, where employment is at will, even an arbitrary or capricious discharge will not give rise to liability on the part of the employer. *See, e.g., Herndon* v. *Consumers Power Co.*, 72 Mich. App. 349, 249 N.W.2d 419 (1976).

Toussaint did not alter the general rule that indefinite hirings are terminable at will. It also preserved the presumption that the parties intended to obligate themselves to an at-will relationship. 408 Mich. at 600. That presumption has been reaffirmed in a number of post-*Toussaint* cases. *Reid* v. *Sears Roebuck & Co., supra*; *Wickes* v. *Olympic Airways*, 745 F.2d 363 at 369 (6th Cir. 1984); *Kay* v. *United Technologies*, 757 F.2d 100 (6th Cir. 1983); *Valentine* v. *General American Credit, Inc.*, 420 Mich. 256, 362 N.W.2d 628 (1984); *Suchodolski* v. *Michigan Con. Gas Co.*, 412 Mich. 692,

316 N.W.2d 710 (1982); *Ledl* v. *Quik Pik Food Stores, Inc., supra*; *Schwartz* v. *Michigan Sugar Co.*, 106 Mich. App. 471, 308 N.W.2d 459 (1981), *lv. den.*, 414 Mich. 870 (1982).

In *Valentine* v. *General American Credit, Inc.*, the Michigan Supreme Court reaffirmed an employer's right to remain an at-will employer:

> Employers and employees remain free to provide, or not to provide, for job security. Absent a contractual provision for job security, either the employer or the employee may ordinarily terminate an employment contract at any time for any, or no, reason.

420 Mich. at 258-59 (footnote omitted).

Under the *Toussaint* doctrine, the presumed at-will employment relationship can be modified only where the employer adopts a policy that clearly and deliberately indicates that the employment relationship will only be terminated for cause:

> [E]mployers are most assuredly free to enter into employment contracts terminable at will without assigning cause. We hold only that an employer's express agreement to terminate only for cause, or statements of company policy and procedure to that effect, can give rise to rights enforceable in contract.

408 Mich. at 610.

2. Only a *"legitimate expectation"* based on objective criteria, and not an employee's unilateral and subjective expectation of discharge only for cause, is sufficient to state a *Toussaint* cause of action. *Toussaint, supra*, at 598, 615, 617, 619; *Schwartz* v. *Michigan Sugar Co., supra*; *Henry* v. *Hosp. and Health Services Credit Union*, 164 Mich. App. 90, 416 N.W.2d 338 (1987).

No such legitimate expectation can exist where, as here, an employer has disclaimed assurances of job security and/or has expressly stated that its relationship with its employees is terminable at the will of either party. *Toussaint*, 408 Mich. at 612, n. 24.

The *Toussaint* Court further noted that apprising employees that policies are subject to unilateral change precludes "legitimate expectations" that policies will remain in effect:

> Employers can make known to their employees that personnel policies are subject to unilateral changes by the employer. Employees would then have no legitimate expectation that any particular policy would continue to remain in force.

Id. at 619.

3. The Company's OPM's contained an express at-will policy statement, which Vollrath admitted reading. Accordingly, as the Sixth Circuit found, Vollrath could not have a reasonable or legitimate expectation that his employment was other than terminable at the will of either party. *See, e.g., Dell* v. *Montgomery Ward & Co.*, 811 F.2d 970 (6th Cir. 1987); *Haas* v. *Montgomery Ward & Co.*, 812 F.2d 1015 (6th Cir. 1987); *Engquist* v. *Livingston County*, 139 Mich. App. 280, 284, 361 N.W.2d 794 (1984).

As Georgia-Pacific argued below, and as the Sixth Circuit has recognized in *Reid* and *Pratt*, the Michigan Court of Appeals has ruled that an express at-will policy statement in an employee handbooks or other documents provided to employees, such as the express at-will policy statements in the Company OPM's, precludes any legitimate expectation of a for-cause contract for both prospective and existing employees. In *Eliel* v. *Sears, Roebuck & Co., supra*, the Court of Appeals enforced a similar express at-will policy statement in an employment application and permitted

summary judgment in favor of the employer, even where, as here, plaintiff Eliel claimed that certain oral statements made to him after he signed the application created an oral cause contract. Because the Sears policy statement apprised employees that no one except the president or vice president of the company could alter an at-will employment relationship, the Court declined to permit the oral statements to negate the written policy statements. Similarly, in *Ledl* v. *Quik Pik Food Stores, Inc., supra,* the Michigan Court of Appeals enforced a written at-will policy statement which was unilaterally imposed upon an employee, upon reasonable notice to all affected employees, several years after she was hired. Recently, in *Pepperman* v. *Automobile Club of Michigan Ins. Group,* 181 Mich. App. 519, 450 N.W.2d 66 (1989), the Michigan Court of Appeals again refused to permit alleged oral statements to modify a written at-will policy statement which by its terms prohibited any modifications unless in writing by the company president's authorized representative. Again, in *Grow* v. *General Products, Inc.,* 184 Mich. App. 379, 457 N.W.2d 167 (1990), the Michigan Court of Appeals affirmed summary judgment for the dual reasons that the oral statements alleged by plaintiff Grow were insufficient to give rise to a legitimate expectation of a for-cause termination contract, and that distribution of the company's express at-will policy statement to all employees, with review of the statement at staff meetings, as here, was sufficient "reasonable notice" under *Bankey* to permit enforcement of the at-will policy.

The two cases upon which Vollrath heavily relies in his petition for a writ of certiorari are inapposite. Not only is the holding in *Dalton* v. *Herbruck Egg Sales, Inc., supra,* limited to policy manuals which appear internally inconsistent, but also there had been no express at-will policy statement issued by the employer in *Langeland* v. *Bronson Methodist Hospital,* 178 Mich. App. 612, 444 N.W. 2d 146 (1989).

Given these intermediate appellate decisions, which conflict with *Dalton*, the Sixth Circuit could well conclude that Michigan law permitted enforcement of Georgia-Pacific's express at-will policy statements.

4. The disclaimers in the 1983 and 1985 OPM's notwithstanding, Vollrath's claim that he has an implied contract for just cause seems to rest on a number of vague, casual statements made among friends, over beers, after work. Apparently, on several occasions, Norman said words to the effect that "the best way to keep your job was to do it" [Norman dep. 54]. Norman testified that he never said nor meant that if an employee did his job it was guaranteed Georgia-Pacific would not discharge him [*id.* at 55].

Initially, it is significant that such vague statements under informal circumstances, as the District Court and the Sixth Circuit both concluded, do not create a contract or agreement terminable only for cause. *See Carpenter* v. *American Excelsior Co.*, 650 F. Supp. 933 at n. 6 (E.D. Mich. 1987), in which District Court Judge Newblatt labelled such statements nothing more than language of hope, but not of promise.

In any event, even if such statements were deemed "language of promise," they could not give rise to a "legitimate" expectation of "for-cause" employment.

An employee cannot obtain an advantage by claiming that he did not read or understand an employee handbook's terms. *Reid* v. *Sears Roebuck & Co.*, 790 F.2d at 461; *Carpenter* v. *American Excelsior Co.*, *supra*. Here, there is no genuine issue of material fact that Vollrath received and reviewed the express at-will policy statements at issue, while assisting in the defense of two wrongful discharge lawsuits and at several staff meetings [Wagner dep. 6-7, 9-10, 12-13; Fuller dep. 11-16; Kievit dep. 24; Campbell dep. 31-32]. It is also significant, as the Sixth Circuit noted, that plaintiff admitted

reading the at-will disclaimer in the 1985 OPM [Vollrath dep. 320].

Given his deposition admissions, as the Sixth Circuit properly found, Vollrath could not have had a legitimate expectation of job security. *Longley* v. *Blue Cross & Blue Shield of Michigan*, 136 Mich. App. 336, 340-41, 356 N.W.2d 20 (1984) (plaintiff's *Toussaint* claim dismissed because she lacked subjective belief that she was terminable for cause even though handbook said good cause, since subjective expectancy is required). *See also, Dell* v. *Montgomery Ward & Co., supra*; *Haas* v. *Montgomery Ward & Co., supra*; *Edwards* v. *Whirlpool Corp.*, 678 F. Supp. 1284 (W.D. Mich. 1987).

5. Vollrath also refers to an unauthorized memo which does not even mention the subject of job security. However, that memo did not, by Vollrath's own admission, have any effect in light of the at-will policy in Georgia-Pacific's 1983 and 1985 OPM's [Vollrath dep. 136-137].

Of significance is Vollrath's admission that the memo says nothing about the criteria the Company would use in deciding whether or not to terminate his employment, or how long he would continue to work with the Company [*id.* at 119]. As such, even absent the Company's clear at-will policy statement, the memo cannot serve as the objective basis upon which a *Toussaint* claim is founded. *See Skurski* v. *Detroit Strip Div., Cyclops Corp.*, No. 87 CV 73127 DT (E.D. Mich. June 24, 1988) [Ex. 26, R. 41].

Moreover, Vollrath admitted that, if he had read the Company's at-will policy, he would have known that Norman's letter was against policy and was "no good" [Vollrath dep. 136-137]. Finally, he conceded that no one (including Norman) could do anything inconsistent with the OPM's termination section [Vollrath dep. 330-334]. That admission alone demonstrates that, even if the oral and written statements alleged were true and

applicable, he could have no legitimate expectation based upon those statements to a just-cause contract. *Longley* v. *Blue Cross and Blue Shield of Michigan, supra*; *Schwartz* v. *Michigan Sugar Co., supra.*

Vollrath also believed the memo was not operative if, as in this case, he was in a different job other than that of Plant Maintenance Superintendent [*id.* at 116]. This belief is consistent with Michigan law which establishes that Vollrath's later agreement to accept the FMR position superseded and rescinded any "promise" that Norman may have made in his memo. *See, e.g., Culver* v. *Castro,* 126 Mich. App. 824, 338 N.W.2d 232 (1983).

Most significantly, and dispositive in the Sixth Circuit's view, Norman's memo was written in about March 1984 [Vollrath dep. 111], when the 1983 OPM was in effect, which contained an express at-will policy statement that by its terms could not be modified except in writing by the CEO of the Company.

6. In any event, both the memo and the alleged oral statements, which Vollrath alleges were made by Norman, were not made within the scope of his authority. As such, as Georgia-Pacific argued below, they cannot form the basis by which Vollrath can withstand summary judgment.

If the statements were offered to prove the operative facts of the employment contract, then they could not be admitted as a party admission in order to withstand summary judgment. F.R.E. 801(d)(2)(D); *Hill* v. *Spiegel, Inc.*, 708 F.2d 233 (6th Cir. 1983); *Mitroff* v. *Xomox Corp.*, 797 F.2d 271 (6th Cir. 1986); *N.L.R.B.* v. *Sherwood Trucking Div.*, 775 F.2d 744 (6th Cir. 1985). Such statements would be admissible only for the limited purpose of proving that such a statement was made, but *not* for the truth of the matter asserted within the statement. *Restatement, Second, of Agency,* §§ 284 and 286. Unless there is *actual* authority to make statements offered as admissions against a principal, they

are inadmissible, and whether or nor there is apparent authority is immaterial. *Restatement, Second, of Agency,* § 286.

7. Vollrath's contention that the Sixth Circuit misapplied Michigan law in granting Georgia-Pacific summary judgment is inconsistent with two cases which were handed down after he filed his initial brief on appeal.

In *Bankey, supra,* the Michigan Supreme Court permitted employers to alter even a for-cause job security term by a subsequently announced at-will policy, even where the employer had not expressly reserved a right to unilaterally amend its policies, as long as the affected employees received reasonable notice of newly adopted and uniformly applied policy. Given the numerous meetings held by the Company to apprise employees of its at-will employment policy, "[i]t is difficult to imagine what more the [Company] might have done to make it crystal clear to [Vollrath], and all [Georgia-Pacific] employees, that, unless some other arrangement were made directly with the [persons mentioned in the disclaimers], [Georgia-Pacific] employees are employees "at will" who may be discharged with or without cause." *Dell* v. *Montgomery Ward & Co., Inc.,* 811 F.2d at 974.

In *Bullock, supra,* the Michigan Supreme Court declined to affirm summary judgment on a thin record where the alleged *Toussaint*-type oral promise recited in the Complaint (that plaintiff would have a "lifetime job" as long as he did not steal) was not rebutted by affidavit testimony that a policy manual was often revised. There is no suggestion in *Bullock* that the AAA manual there contained an express at-will policy statement containing merger and no-modification clauses, as here. In fact, the *Bullock* Court pointedly noted that the record had not been sufficiently developed.

In contrast, here, the record evidence shows that the oral statements and memo at issue, whether made before or after the 1983 and 1985 OPM's, cannot render the express at-will policy statements ambiguous since Vollrath had reviewed and read the policy statements and admitted that Norman had no authority to alter Company policy. Vollrath also acknowledged that Georgia-Pacific has had a long-standing practice of unilaterally modifying its personnel policies [Vollrath dep. 315-316]. He also testified that no one could rely on any part of any policy remaining in effect forever and it could be modified, eliminated or remain the same [*id.* at 316]. Finally, Vollrath admitted that whatever policy in effect at the time applies until changed [*id.*]. This testimony obviates any legitimate expectation by Vollrath that any "for-cause" policy would continue and remain the same. *See Bankey, supra; Schwartz, supra; Engquist* v. *Livingston County, supra.*

8. Georgia-Pacific also argued below that any alleged modifications to an express at-will contract would be void under the Michigan Statute of Frauds.[3]

Here, Vollrath has never alleged that the oral "modifications" were made pre-hire, were later confirmed in writing "signed by the party against whom it is sought

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[3] M.C.L.A § 566.1; M.S.A. § 26.978(1) provides that:

> An agreement hereafter made to change or modify, or to discharge in whole or in part, any contract, obligation, or lease, or any mortgage or other security interest in personal or real property, shall not be invalid because of the absence of consideration: Provided, that the agreement changing, modifying, or discharging such contract, obligation, lease, mortgage or security interest shall not be valid or binding unless it shall be in writing and signed by the party against whom it is sought to enforce the change, modification, or discharge.

M.C.L.A § 566.1 has been held applicable to employment relationships; *Small* v. *Chemlawn*, 584 F. Supp. 690 (W.D. Mich. 1984), *aff'd* 765 F.2d 146 (6th Cir. 1984); *Hayes Albion Corp.* v. *Kuberski*, 108 Mich. App. 642, 650, 311 N.W.2d 122 (1981), *aff'd in part, rev'd in part*, 421 Mich. 170 (1984).

to enforce the change," or that any consideration was given in exchange for these alleged oral modifications. Thus, under M.C.L.A. § 566.1, these statements, which are not supported by consideration and which are not in writing, are not enforceable.

Nor can the memo written to him by Norman be enforced as a modification of the OPM's. Vollrath was aware that Norman did not have the authority to write the memo [Vollrath dep. 96]. Such an unauthorized act by an agent cannot bind a principal where the promisee knows that the agent has exceeded the scope of his authority. *Restatement 2d, Agency,* § 166. Since the memorandum is thus also not signed by the party against whom enforcement is sought, M.C.L.A § 566.1 invalidates any claim that Vollrath's at-will employment relationship was modified by Norman's memorandum.

III.

GIVEN VOLLRATH'S WAIVER OF THE ISSUE AND HIS ADMISSIONS, GEORGIA-PACIFIC HAD CAUSE TO DISCHARGE HIM.

Although he failed to brief the issue of whether position elimination constituted cause as a matter of law before the Sixth Circuit, and therefore abandoned the issue on appeal, Vollrath raises the issue now as he seeks review by this Court.

Apart from plaintiff's conclusory allegations, there is no record evidence to raise a genuine issue of material fact that Vollrath's position was eliminated as the work force at the Kalamazoo facility declined approximately 12% from 1984 to 1987, that plaintiff was not replaced, and that a cost savings was effected by the position elimination [Taylor dep. 39-40; Kievit dep. 12-13, 15-17, 23].

1. It is well-established that termination of an employee for reasons of economic necessity does not

constitute grounds for a wrongful discharge claim. *Boynton* v. *TRW, Inc.*, 858 F.2d 1178 (6th Cir. 1988); *Friske* v. *Jaskinski Builders, Inc., supra* like effect: *Bhogaonker* v. *Metropolitan Hospital*, 164 Mich. App. 563, 565-566, 417 N.W.2d 501 (1987); *Nixon* v. *Celotex Corp.*, 693 F. Supp. 547 (W.D. Mich. 1988) and cases cited therein.

2. Under Michigan law, where a plaintiff, as here, fails to dispute the economic reasons for the elimination of his position, then as a matter of law, the employer has reasonable cause for discharging the employee. *See, Boynton* v. *TRW, supra*, and the cases cited therein.

In *Friske* v. *Jaskinski Builders, Inc., supra*, the Michigan Court of Appeals concluded that to hold otherwise would impose an unworkable burden upon the state's employers:

> Case law indicates that termination of the employment of an otherwise competent employee due to an economically motivated business closing is not grounds for a wrongful discharge claim. *See, e.g., Bouwman* v *Chrysler Corp*, 114 Mich App 670, 681-682; 319 NW2d 621 (1982), *lv den'd*, 417 Mich 989 (1983); *Sahadi* v *Reynolds Chemical*, 636 F.2d 1116, 1118 (6th Cir. 1980); *FS Royster Guano Co.* v *Hall*, 48 F.2d 533, 535 (4th Cir. 1934). We find that these cases are analogous to the instant case and support a holding that, as a matter of law, Plaintiff's discharge for economic reasons, as determined by and within the complete discretion of the board of directors of defendant corporation, constitutes termination for sufficient cause. To hold otherwise would impose an unworkable economic burden upon employers to stay in business to the point of bankruptcy in order to satisfy employment contracts and related agree-

ments terminable only for good and sufficient cause.

Vollrath asserts before this Court for the first time that the alleged offer of a position in Taylorsville "casts doubt" upon the Company's contention that he was terminated during a reduction in the work force at the Kalamazoo facility. However, the testimony upon which Vollrath now relies does not establish any genuine issue of material fact:

> Q. . . . I mean, but in terms of the elimination of the position, was it eliminated because Taylorsville didn't want to pay for Harley any longer?
>
> A. No.
>
> [Petition, p. 5, n. 2.]

Such testimony is completely inconclusive about the economic considerations at the *Kalamazoo* mill where Vollrath was based, and is hardly sufficient to raise any genuine issue of material fact that Vollrath's position was eliminated from the Kalamazoo payroll for economic reasons, particularly where Vollrath himself refused to return to the Taylorsville plant.

3. Vollrath also suggests that the issue of whether position elimination constitutes cause for discharge is presently pending before the Michigan Supreme Court in *McCart* v. *J. Walter Thompson, U.S.A., Inc.*, 181 Mich. App. 611, 450 N.W.2d 10 (1989), *lv. granted*, 434 Mich. 909 (1990). However, *McCart* is inapposite. There, plaintiff alleged that his selection for inclusion in a layoff resulted from the company president's personal dislike of him, rather than from economic motivation. Vollrath has never made any such allegation of pretext, nor has he adduced any record evidence of any reason other than an economic reason for the elimination of his position at the Kalamazoo mill.

CONCLUSION

For any of the foregoing reasons, Respondent Georgia-Pacific Corporation respectfully requests this Court to deny Vollrath's petition for a writ of certiorari.

Respectfully submitted,

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Dated: September 28, 1990

APPENDIX TO BRIEF IN OPPOSITION

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APPENDIX A

CITATIONS TO APPENDIX REQUESTED BY JUDGE KENNEDY TO BE GIVEN TO CLERK

On the issue of whether plaintiff conceded the issue of economically motivated reduction in force so that there is cause as a matter of law:

(A) There was an on-going reduction in workforce of 12% at Kalamazoo facility.

(Taylor dep. 39-40)
R. 46, Ex. 24 at *pp. 1275-1276 of Appendix*

(B) There was a general corporate directive to reduce workforce.

(Kievit Aff, ¶ 8)
R. 41, Ex. 7 at *p. 1014 of Appendix*

(C) Plaintiff's job was eliminated as part of reduction in force due to the directive and shutdown of De-Ink plant.

(Kievit Aff, ¶ 8)
R. 41, Ex. 7 at *p. 1014 of Appendix;*

(Pl. Tr. 213)
R. 41. at *p. 1134 of Appendix*

(D) Plaintiff admits 1985 was a bad year for Kalamazoo plant.

(Pl. Tr. 186-187)
R. 41 at *pp. 1129-1130 of Appendix*

(E) 1986 brought even harder economic times to plant.

(Norman dep. 74-75)
R. 41 at *pp. 1192-1193 of Appendix*

(F) Two other salaried employees were also RIF'd in the 6-month timeframe.

(Kievit dep.)
R. 46, Ex. 22, at *pp. 1257-1258 of Appendix*

(G) Plaintiff was not replaced.

(Kievit dep.)
R. 46, Ex. 22, at *p. 1259 of Appendix*

(H) Plaintiff accepted a $12,000 severance package for which he admitted he was eligible only if his job were eliminated.

(Pl. Tr. 214)
R. 41, Ex. 14, at *p. 1135 of Appendix*

See: 1983 OPM
R. 41 Ex. 9, at *p. 1033 of Appendix*

See: 1985 OPM
R. 41 Ex. 8, at *p. 1026 of Appendix*

(I) For first time on appeal, plaintiff cites pp. 61-62 of Norman's deposition testimony, still without briefing the issue, and claims that Norman stated economics did not motivate Plaintiff separation.

See, in contrast, Norman's deposition testimony at *pp. 1190-1191 of Appendix*, clarifying confusing passage cited by Plaintiff.

(*not* called to court's attention below or filed by Plaintiff (who noticed Norman's deposition) as part of record).

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